

VU Research Portal

Abu Ghraib and the War against Terror - a case against Donald Rumsfeld

Smeulers, A.L.; Niekerk, S.

published in

Crime, Law and Social Change
2009

DOI (link to publisher)

[10.1007/s10611-008-9160-2](https://doi.org/10.1007/s10611-008-9160-2)

document version

Publisher's PDF, also known as Version of record

[Link to publication in VU Research Portal](#)

citation for published version (APA)

Smeulers, A. L., & Niekerk, S. (2009). Abu Ghraib and the War against Terror - a case against Donald Rumsfeld. *Crime, Law and Social Change*, 51, 327-349. <https://doi.org/10.1007/s10611-008-9160-2>

General rights

Copyright and moral rights for the publications made accessible in the public portal are retained by the authors and/or other copyright owners and it is a condition of accessing publications that users recognise and abide by the legal requirements associated with these rights.

- Users may download and print one copy of any publication from the public portal for the purpose of private study or research.
- You may not further distribute the material or use it for any profit-making activity or commercial gain
- You may freely distribute the URL identifying the publication in the public portal ?

Take down policy

If you believe that this document breaches copyright please contact us providing details, and we will remove access to the work immediately and investigate your claim.

E-mail address:

vuresearchportal.ub@vu.nl

Abu Ghraib and the War on Terror—a case against Donald Rumsfeld?

Alette Smeulers · Sander van Niekerk

Published online: 18 November 2008
© Springer Science + Business Media B.V. 2008

Abstract The pictures of the inhuman and abusive treatment of Iraqi prisoners at the Abu Ghraib prison shocked the world. The authors of this contribution will take a criminological approach to the crimes committed and will show—by using an analytical framework used by organizational criminologists—that the abuse and torture at Abu Ghraib was an inevitable outcome of the War on Terror as launched by the U.S. administration in a reaction to the terrorist attack launched against it. The abuse at Abu Ghraib which violated U.S. as well as international human rights law was not caused by a few rotten apples as policymakers tried to make us believe, but was a clear example of a state crime. A state crime for which U.S. leaders within the Bush administration such as the Secretary of Defense Donald Rumsfeld, might be held criminally responsible if they would be prosecuted by the ICC.

Introduction

On the morning of September 11th 2001, an unprecedented terrorist attack on symbolic and strategic buildings took place on U.S. soil. The attack caught the U.S. completely “off guard” and was by all accounts a shocking and traumatizing moment in American history leaving approximately 2900 people dead. From the very outset the Bush administration pointed at Osama bin Laden’s Al Qaeda as the mastermind behind the attack and almost immediately started planning to locate and punish the perpetrators and everyone who in some way or another was involved. On September 15th 2001 President Bush launched the War on Terror and promised the nation in an address on television: “we will smoke them out of their holes” and get them “dead or alive”.

On April 28th 2004, CBS 60 Minutes II aired the gruesome pictures of the abuse of prisoners at Abu Ghraib prison in Iraq at the hands of American soldiers: naked

A. Smeulers (✉) · S. van Niekerk
Department of Criminal Law and Criminology, VU University Amsterdam, De Boelelaan 1105,
1081 HV Amsterdam, Netherlands
e-mail: a.l.smeulers@rechten.vu.nl

prisoners were piled up in a pyramid, some were photographed in sexually suggestive and humiliating poses and one prisoner was held on a leash, to name just a few of the most infamous examples. These pictures, the testimonies of the victims and the investigation of Physicians of Human Rights (PHR) in 2008 are clear evidence of war crimes committed by U.S. personnel at Abu Ghraib.¹ PHR concluded that ‘all detainees suffered severe physical and mental pain as a result of the assaults’ and that ‘they all experienced terror.’² All individuals suffered from chronic physical consequences of the ill-treatment whereas ten out of eleven detainees suffered from lasting psychological consequences of ill-treatment. The detainees had been dehumanized. They were left in poor conditions with a lack of proper sanitation, hygiene and food and were kept naked. They were continuously humiliated and amongst others denied the privacy to go to the toilet. All detainees were subjected to systematic, sexual, religious and cultural humiliation and degradation. This is inhuman treatment. In many cases the abuse went further and surpassed the threshold between inhuman and degrading treatment and torture. Beating them, subjecting them to sleep deprivation, prolonged isolation and sensory deprivation, subjecting them to manipulated environment such as extremely cold or hot temperatures, the use of dogs in a menacing way and threats made to their lives and families, are all forms of torture. According to PHR, one detainee stated that ‘he was pulled by a leather dog leash at Abu Ghraib and was ordered to howl like a dog: he also suspects that soldiers urinated on his back’. Another reported being forced to drink the urine of soldiers. When asked about this incident, he stated, ‘I died at that time... after that I could not eat anything’ (PHR 2008, 84). Another victim described how he was forced to pose in humiliating positions after his underwear had been taken off and while photographs were taken: ‘They were trying to make me look like an animal’ (PHR 2008, 84).

After the pictures were published the Bush administration was quick to condemn the abuse and accuse the low ranking soldiers who featured in the pictures. Secretary of Defense Rumsfeld described the abuse at Abu Ghraib as an isolated case and President Bush talked about: ‘disgraceful conduct by a few American troops who dishonoured our country and disregarded our values.’³ The abuse however did not constitute isolated cases but represented further proof of a widespread pattern.⁴ The only thing that was particular about the Abu Ghraib case was that pictures of the abuse were brought to the attention of the media. Many reports and books on Abu

¹ PHR conducted medical evaluations of eleven detainees—four of which had been detained in Afghanistan and Guantanamo Bay, seven had been detained at Abu Ghraib—by using the Istanbul Protocol which gives guidelines for assessing physical and psychological evidence of torture. See the Istanbul protocol: <http://www.unhcr.ch/pdf/8istprot.pdf>.

² See the full report PHR (2008) *Broken laws, broken lives—medical evidence of torture by US personnel and its impact*, available on: http://brokenlives.info/?page_id=69.

³ See the speech given by Bush on May 25th 2004, available on <http://www.commondreams.org/headlines04/0525-01.htm>.

⁴ See the media reports, several reports by Human Rights Watch such as the report by R. Brody (2004). *The road to Abu Ghraib* and the report by J. Sifton (2006) ‘No blood, no foul’- soldiers’ accounts of detainee abuse in Iraq and the reports by Physicians for Human Rights (PHR), such as PHR (2005). *Break them down—Systematic use of psychological torture by U.S. forces* and PHR (2007). *Leave no marks—enhanced interrogation techniques and the risk of criminality* but also the Taguba Report (2004). Article 15–6 Investigation of the 800th Military Police Brigade, page 16.

Ghraib have already been written and published (a.o. [2, 4, 6, 7, 13, 20]). We do not aim to add any new facts to what is already widely known about the War on Terror and Abu Ghraib. The aim of this article is rather to map and better understand the causes of the abuse by taking a criminological approach to the crimes committed. In the next few paragraphs we will use an integrated theoretical framework which is modelled by the framework used by Kramer and Michalowski [12] and will distinguish three levels of analysis: governmental, institutional/organizational and personal as well as three catalysts for action: motivation, opportunity and lack of social constraints. The model aims to show how governmental political rhetoric and policy measures are related to the abuse committed by the rank—and file soldiers. In the last paragraphs we will focus on the question as to who can be held criminally responsible for the crimes committed at Abu Ghraib and will thus discuss the possible legal consequences of our conclusions. We will more particularly focus on the question whether high level policy makers such as the former Secretary of Defense Rumsfeld can be prosecuted by the ICC for the crimes committed at Abu Ghraib.

The trigger event: the 9/11 attacks and the perceived threat of terrorism

The unprecedented and vicious 9/11 attacks left the U.S. devastated and caused a moral panic. Ordinary citizens were scared and wanted to re-establish a previously held and unquestioned feeling of safety and security. The first weeks and months after 9/11 represented a period of intense nationalism and unity in which the people demanded hard action. President Bush and other high ranking officials went on national television promising to do everything within their power to prevent future attacks on U.S. soil. Yet the very attacks were proof of the fact that mistakes had been made within the U.S. intelligence community as it had failed to prevent these attacks. The U.S. saw itself confronted with an almost invisible enemy, a stateless terrorist group, and an enemy the U.S. had no idea how to combat. Just after the U.S. had established itself within the New World Order as the only superpower, it saw its hegemonic position threatened by a new danger. The U.S. was keen on preserving its sense of national security and wanted to re-establish a sense of safety by reducing its obvious vulnerability but it had to prepare itself for a fight it was not familiar with and utterly unprepared for. It had to fight a group of people driven by a strong religious zeal, with an utter disrespect for human life and who did not find themselves bound to any rules apart from their own. The enemy the U.S. faced was highly motivated, fighting a war they considered holy and for which they were prepared to sacrifice their own lives. Not just *risk* their lives as soldiers generally do, but it was more: the enemy the U.S. faced was prepared to accept certain death by committing suicide attacks. The U.S. government concluded that it took all possible means to fight this enemy. The until then rather unpopular Bush administration felt the urge and the need to show itself worthy of the presidency but it saw itself confronted with a perceived threat to its own survival and a perceived lack in effective and legitimate means to deter this threat. From a criminological perspective it could be stated that the government felt an enormous strain to act decisively.

The CIA had always been an expert in fighting the cold war, was trained to fight the former Soviet-Union, but the War on Terror was of an entirely different nature

and the effectiveness of legitimate means in this struggle was considered to be extremely doubtful. As vice-president Dick Cheney stated in an interview with *Meet the Press*: ‘we have to work sort of the dark side if you will, spend some time in the shadows in the intelligence world. A lot of what needs to be done here will have to be done quietly without any discussion using sources and methods that are available to our intelligence agencies if we are going to be successful. That’s the world these folks operate in and... so it’s going to be vital for us to use any means at our disposal basically to achieve our objective.’⁵ Knowledge about the terrorist organisation and their plans, so-called actionable intelligence played a crucial role in the War on Terror. In a Department of Defense (DoD) briefing on January 11, 2002 Rumsfeld explained: ‘The faster we can interrogate these people and identify them and get what they have in them out of them, in as graceful a way as is possible, we have a better chance of saving some people’s lives’ ([20], 7). In the Field Manual for interrogation (FM 34–52); a manual long rooted in military tradition reliability and building rapport were the key concepts. The effectiveness of these methods in this new era however became a point of debate. At Guantanamo Bay there seemed to be two groups within the military, those who wanted to hold on to the age old military tradition and those who considered the old traditions out of date and ineffective. Those who favoured a tough approach won: generals who were considered too nice were relieved from their duties and replaced by generals who ‘put the well-being and safety of this country before the comfort of captured terrorists’ ([20], 39). Doug Feith, Undersecretary of Defense for Policy explained the dilemma ([20], 188): ‘Here we are, we’ve been attacked, and we’re concerned about the next attack. The only way to fight this war is to get the intelligence about what the enemy is doing. During the Cold War we could get that from satellites looking at armoured formations. In this war the intelligence is all in people’s heads. So interrogation is as important as our eyes in the skies during the Cold War. You cannot overstate [...] the importance of interrogation because the intelligence that we need to fight this war, defend the country, protect possibly millions of people from attacks by smallpox or anthrax, that intelligence is in the heads of these people. We need to extract it.’ The search consisted of finding effective means to do just so.

From organizational criminology we know that highly goal oriented organizations which find themselves confronted with a threat to their own survival have a high likelihood to rely on illegitimate means when (1) legitimate means are considered ineffective; (2) illegitimate means are readily available and (3) there is no effective legal control (Cf. [1]). The U.S. government, when compared to ordinary organizations, found itself in a unique position as it could use its administrative power to create its own means and to simultaneously legitimize these means.

The governmental level: motivation and opportunity

President Bush’s prompt reaction to the terrorist attacks was to launch the War on Terror. In his statement on September the 11th Bush stated: ‘Today, our fellow

⁵ From the documentary ‘Taxi to the dark side’ directed by Alex Gibney (2007).

citizens, our way of life, our very freedom came under attack in a series of deliberate and deadly terrorist acts. ... The search is underway for those who are behind these evil acts. I've directed the full resources of our intelligence and law enforcement communities to find those responsible and to bring them to justice.'⁶ By literally engaging in a war—rather than in a metaphorical war—the Bush administration delegated unto itself extraordinary powers enjoyed only by a wartime government [18]. Its main aim was not to break the rules but to bend them to such an extent that it could fight the War on Terror by the means it deemed necessary.

According to Goldsmith [5], the former Assistant Attorney General in the office of legal counsel, officials within the administration wanted to abide by the law but the pressure to create sufficient lee-way was so high that the counselling lawyers no longer clarified the exact boundaries of the law but started to search for means to stretch these boundaries to the extreme limits and beyond. Goldsmith recalls that when he failed to put a proposed counterterrorism initiative on a legal footing, Addington, Dick Cheney's General Counsel reacted in disgust: 'If you rule that way, the blood of the hundred thousand people who die in the next attack will be on your hands' ([5], 71). The result was that within the Rumsfeld team associates went to great lengths to find the right lawyers to sign off the requests for authorizing certain (illegitimate) techniques and to bypass those who would not agree.

The Bush administration found effective means to create more lee-way to fight terrorism and to simultaneously reduce social and legal control on their policies. Firstly, President Bush conveyed upon himself constitutional war time powers. These broad constitutional powers gave the President unlimited discretion in deciding over broad issues such as the refusal to grant certain detainees Prisoner-of-War status and even to suspend the use of the Geneva Conventions—an unprecedented move in U.S. history.⁷ The infamous Bybee memo even suggested that Section 2340(A) of the Torture Statute would be unconstitutional if it 'impermissibly encroached on the President's constitutional power to conduct a military campaign' ([4], 32). In yet another memo the government lawyers stated: 'Congress may no more regulate the President's ability to detain and interrogate enemy combatants than it may regulate his ability to direct troop movements on the battlefield.'⁸ By relying on war-time power the U.S. administration ensured that it could effectively bypass Congress and democratic control in their fight against terrorism.

Secondly flawed legal constructions and reasoning were used to argue that certain rules and regulations were not fully applicable. In particular the Geneva Conventions were considered to be not applicable to the prisoners captured in Afghanistan and held at Guantanamo Bay. According to Gonzales, Counsel for President Bush a new paradigm 'rendered obsolete Geneva's strict limitations on questioning of enemy prisoners.'⁹ The people arrested on suspicion of terrorism could thus no longer rely on the protection of the Geneva Convention. Furthermore the definition of torture

⁶ See for the full statement: <http://www.whitehouse.gov/news/releases/2001/09/20010911-16.html>.

⁷ See Memo # 11 signed by Bush, [4], 134–135.

⁸ See memo # 25 in Greenberg and Dratel [4], xv.

⁹ See Memo # 7 in Greenberg and Dratel [4], xv.

was restricted in such a way that only those forms of torture which resulted in pain which is ‘equivalent in intensity to the pain accompanying serious physical injury such as organs failure, impairment of bodily function or even death’, were considered torture.¹⁰ The next step was to authorize and legitimize means which were illegal under both national and international law such as the use of stress positions, isolation, sensory deprivation, sleep deprivation, forced nudity, forced grooming, inducing stress and the exploitation of phobias.¹¹

Thirdly, detainees were held on territory outside the U.S. which brought them beyond the protection and jurisdiction of the U.S. constitution. About 600 detainees were held at Guantanamo Bay, Cuba, while others were sent to secret detention centres in undisclosed locations.¹² The consequence thereof was that prisoners who felt that their rights were violated could not raise complaints before American courts thus rendering judicial control ineffective.

Fourthly forces were created who could operate in secret and with almost unprecedented discretion to do what they deemed necessary. The operational details on how the Special Forces operated were only known to the Pentagon, the C.I.A. and the White House ([7], 16, [24]). And lastly, private contractors were hired to fulfil certain specific tasks and jobs. These private contractors operated in a kind of legal vacuum as they could not be prosecuted under American or military law and had made contractual deals so that they could not be prosecuted under Iraqi law.

All these measures resulted in a situation in which broad opportunities to resort to illegal means were created, illegitimate means were declared legitimate and the ordinary means of control were rendered inoperable. The carefully designed system of checks and balances which characterizes democratic societies was thus eroded (See Table 1). Political rhetoric was furthermore full of neutralizations techniques which aimed to give those who fought the War on Terror leave from ordinary moral constraints. There was a continuous devaluation of the enemy (they are just terrorists), a denial of injury (this is not torture), a denial of responsibility (they decided not to abide by the rules, we merely followed), an appeal to higher values (we have to do everything to preserve our national security) and a condemnation of the condemners (by equating being soft on terrorism with supporting terrorism). An example of the latter is described by Hersh ([7], 19): Burkhalter, the U.S. policy director of Physicians for Human Rights had a meeting with William Haynes from the Pentagon who came in mad according to Burkhalter: ‘He started the meeting by saying ‘We don’t torture and then lectured us—Those of you in the human rights community who suggest that what the United States does to detainees is torture are trivializing the meaning of torture.’ His meaning was clear, Burkhalter added: “if you are calling what we do in our interrogations torture—keeping people awake and in binds—you are doing a disservice to the victims of real torture.” By institutionalizing these neutralization techniques in political rhetoric and policy measures (see Table 2) the government could stay committed to the ordinary norms

¹⁰ See the infamous memo by Assistant Attorney General Jay S. Bybee in Greenberg and Dratel [4], xiii.

¹¹ See Memo # 21 in Greenberg and Dratel [4].

¹² A government official is quoted to have said: ‘We don’t kick the [expletive] out of them. We send them to other countries so they can kick the [expletive] out of them.’ HRW 2005, 17.

Table 1 Theoretical framework on the war on terror and the Abu Ghraib scandal

Catalysts for action\ Levels of analysis		Motivation	Opportunity structure	Operationality of control
Governmental level	Institutional and organizational level	<p>Preserve national security</p> <ul style="list-style-type: none"> • Diminish terrorist threat • Reduce vulnerability <p>• Re-establish powerful position</p> <p>Protect political interests</p>	<p>Fear and moral panic</p> <p>Political support</p> <ul style="list-style-type: none"> • Call for hard action <ul style="list-style-type: none"> • Unity, nationalism, patriotism • Broad international support <p>Use of administrative power</p> <p>Use of war time powers</p>	<p>No effective international enforcement mechanisms</p> <p>No political opposition: US only hegemonic superpower</p> <p>Acknowledgement of war time powers: bypassing democratic control</p> <p>Lack of criticism due to nationalistic call for hard action</p>
		<p>Defend national security</p> <p>Military honour at stake</p> <ul style="list-style-type: none"> • Desire to do a good job • Prevent defeat by this invisible enemy <p>Urge to obtain actionable intelligence</p>	<p>Legitimization of inhuman treatment and abuse</p> <ul style="list-style-type: none"> • Non-applicability of (international) rules • Guidelines on abusive techniques • MI ordering MP to loosen them up <p>Using MP for MI-jobs</p> <ul style="list-style-type: none"> • Unclear chain of command • Unclear rules and regulations • Diffusion of responsibility <p>Social chaos</p> <ul style="list-style-type: none"> • Harsh and inhuman circumstances <p>Orders to “loosen them up”</p> <p>Normalization of abuse</p> <ul style="list-style-type: none"> • standard operating procedure • socialization into abuse <p>Absolute power over prisoners</p> <p>Lack of supervision and tacit approval</p>	<p>Illegal methods legitimized</p> <p>Diffuse rules and regulations and entitlement</p> <p>Unclear chain of command and lack of supervision</p> <p>Culture of compliance: closing ranks</p>
Personal level		<p>Urge to be a good soldier</p> <p>Urge to get results</p> <p>Urge to fit in</p> <p>Act out frustration (and aggression)</p> <p>Enjoy power</p>		<p>Obedience to authority: lack of responsibility</p> <p>Culture of compliance</p> <p>Normalization of deviance</p> <p>Neutralization techniques</p>

@ model based on the model by Kramer and Michalowski [12] (Cf. [9], p. 149)

Table 2 Institutionalized neutralization techniques

Neutralization techniques	Political rhetoric	Policy measures
Denial of responsibility (Acts are due to forces outside of the individual and beyond his control)	Dick Cheney, vice president, September 16, 2001 in a television interview: 'We also have to work, though, sort of the dark side if you will. We've got to spend time in the shadows in the intelligence world. A lot of what needs to be done here will have to be done quietly, without any discussion, using sources and methods that are available to our intelligence agencies, if we're going to be successful. That's the world these folks operate in, and so it's going to be vital for us to use any means at our disposal, basically, to achieve our objective.' Bush speech September 21, 2001: 'Tonight we face new and sudden national challenges ... Great harm has been done to us. We have suffered great loss. And in our grief and anger we have found our mission and our moment.'	Sept. 14th 2001: War Power Resolution Act—giving the president broad discretion and power: US president can not be held responsible: war time powers February 7th 2002: Bush announced in a written order that the Geneva Conventions would not apply in the war on terror because the war on terror ushered a new paradigm
Denial of victim (The victim is described as the wrongdoer.)	Bush speech 21 September 2001: On September 11th, enemies of freedom committed an act of war against our country. ... The terrorists' directives commands them to kill Christians and Jews, to kill all Americans and make no distinctions among military and civilians, including women and children. ... They are recruited from their own nations and neighbourhoods and brought to camps in places like Afghanistan where they are trained in the tactics of terror. They are sent back to their homes or sent to hide in countries around the world to plot evil and destruction.... These terrorists kill not merely to end lives, but to disrupt and end a way of life.'	Memo January 9th 2002: Unlawful combatants are not entitled to rights, neither from the Geneva Conventions, nor constitutional rights, nor human rights MCA 2006: stripped Guantanamo detainees of habeas corpus, authorized coerced testimony, barred foreigners from invoking the Geneva Conventions and watered down the federal war crimes statute.
Denial of injury (The injury is a form of rightful retaliation.)	Alberto Gonzales, former White House counsel: "'We face an enemy that targets innocent civilians,'" Gonzales would tell journalists 2 years later, at the height of the furor over the abuse of prisoners at Abu Ghraib prison, in Iraq: "We face an enemy that lies in the shadows, an enemy that doesn't sign treaties. They don't wear uniforms, an enemy that	Memo August 2002: Torture was redefined as to merely include only the most extreme forms of torture such as those resulting in organ failure or death.

Table 2 (continued)

Neutralization techniques	Political rhetoric	Policy measures
	owes no allegiance to any country. They do not cherish life. An enemy that doesn't fight, attack or plan according to accepted laws of war, in particular [the] Geneva Conventions.' ([7], 5)	
Appeal to higher loyalties (National security and American safety are at stake)	President Bush September 11, 2001: 'Tonight, we are a country awakened to danger and called to defend freedom. ... We will direct every resource at our command—every means of diplomacy, every tool of intelligence, every instrument of law enforcement, every financial influence, and every necessary weapon of war—to the destruction of the defeat of the global terror network... The only way to defeat terrorism as a threat to our way of life is to stop it, eliminate it and destroy it where it grows.... This is not, however, just America's fight. And what is at stake is not just America's freedom. This is the world's fight. This is civilization's fight. This is the fight of all who believe in progress and pluralism, tolerance and freedom.'	Sept. 14th 2001: war time powers: National laws, constitutional rights and international treaties and ordinary democratic checks and balances did no longer apply due to the war time powers of the president The 'new paradigm' of the war on terror 'renders obsolete' the 'strict limitations on questioning of enemy prisoners' required by the Geneva Conventions (Gonzales memo January 25th 2002).
Condemnation of condemners (Silence opposition by blaming the condemners for not adequately assessing the situation)	President Bush in a statement on September, 11th 2001: 'today, our fellow citizens, our way of life, our freedom came under attack in a series of deliberate and deadly terrorist attacks. ... America was targeted for attack because we're the brightest beacon for freedom and opportunity in the world. And no one will keep us from that light from shining. ... Today our nation saw evil, the very worst of human nature. ... The search is underway for those who are behind these evil acts. I've directed the full resources of our intelligence and law enforcement communities to find those responsible and to bring them to justice. We will make no distinction between the terrorists who committed these acts and those who harbour them. ... America and our friends and allies join with all those who want peace and security in the world, and we stand together to win the war against terrorism.'	There are no policy measures but several examples of the consequences and reactions to internal opposition: When Goldsmith told Addington that he did not believe that the surveillance program being conducted by the NSA was legal, Addington replied: "If you rule that way, the blood of the hundred thousand people who die in the next attack will be on your hands." [6]

and values of a democratic society but at the same time qualify the exceptions to the rule as acceptable and justifiable (Cf. [22]). By doing so the U.S. administration in an unprecedented effort created the circumstances in which it could legitimize and justify illegitimate means (Cf. [26], 141–142).

One of the most important memo's within the context of the War on Terror was the memo which was signed for approval by former Secretary of Defense Donald Rumsfeld on December 2nd 2002 and in which he authorized the use of 24 techniques. Military personnel at Guantanamo Bay had requested the approval of these techniques on October 11th 2002. The techniques were to be used against high-value detainees and particularly on Al-Qahtani also known as detainee 063 who was detained at Guantanamo Bay. The techniques were approved by Rumsfeld after being advised to do so by Department of Defense General Counsel William J. Haynes in a Memo on November 27, 2002.¹³ The authorized techniques such as sensory deprivation, sleep deprivation, forced grooming and forced nudity would inevitably lead to inhuman and degrading treatment and even torture. The techniques went far beyond what was allowed in the Field Manual 34–52 and are in violation of both national law (such as the Torture Act and the War Crimes Act) and international law such as the Geneva Conventions and the Convention against Torture.¹⁴ International treaty bodies such as the United Nations Committee against Torture had in the past clearly indicated that such measures were in violation with the Convention against Torture. The most damaging aspect of this memo however was the legal reasoning that the absolute nature of the right not be tortured could be bypassed for reasons of military necessity and national security. The memo was in line with the earlier reinterpretation of the definition of torture by Jay S. Bybee, Assistant Attorney General of the Office of Legal Counsel of the U.S. Department of Justice in a memorandum to the Counsel to the President Alberto Gonzales¹⁵ and the memo by President Bush on February 7th 2002 addressed to the Secretary of State and Secretary of Defense in which he states that 'detainees be treated humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva.' The immediate effect of the approval of these 24 techniques was experienced by detainee Al-Qahtani on whom the techniques were applied directly after their approval. The log of his interrogation which was later published leaves no doubt as to whether or not these techniques should be considered as inhuman treatment and torture.¹⁶ Although the techniques were authorized in relation to the detainees at Guantanamo Bay the policy on how to treat detainees migrated to Iraq and Afghanistan at a later stage during the war and the same techniques were used at

¹³ See Memo 21 in Greenberg and Dratel [4] and see for Secretary's Rumsfeld approval: http://www.npr.org/documents/2004/dod_prisoners/20040622doc5.pdf including the by now infamous words reflecting his disdain: 'However, I stand for 8–10 hours a day. Why is standing limited to 4 hours?'.

¹⁴ In his book *Torture Team* Sands 2008, 2 qualified this memo as a piece of paper which changed the 'course of history.'

¹⁵ Memo of August 1st 2002 reprinted in Greenberg and Dratel [4], 172–217.

¹⁶ See the published interrogation log which is available at: <http://www.time.com/time/nation/article/0,8599,1169322,00.html>.

the Abu Ghraib prison. Although the approval was rescinded at a later stage, the damage had been done. Besides the final memo on the issue (the memo of April 16th 2003) there still seemed to accept that military necessity could be used as an excuse for torture.

Governmental level: lack of constraints

Before focusing on the next level, the institutional and organizational level, it is important to say a few words on the legitimacy of the measures taken by the U.S. and the lack of social control and constraints. Within the U.S., the government is the highest authority and can thus indeed use its extraordinary (wartime) powers in a time of war but: even in those cases the government is bound by both national and international law. According to national law the U.S. needs to respect the right to habeas corpus at all times. According to international law, to which the U.S. is bound as is every other state within the international community, there are limitations to these powers. First of all even in periods of a national emergency—in which certain human rights can be temporarily suspended—there are a number of fundamental human rights which may never be suspended or restricted. The right to be free from torture for instance is a rule of *ius cogens*, a norm of international law which may never and under no circumstances be violated.¹⁷ By restricting the definition of torture the U.S. government thus violated international law.¹⁸ A second example is the application of the Geneva Conventions which cannot be suspended for the mere reason that the opposing party does not abide by these rules. The U.S. furthermore does not have the discretion to use or apply certain segments of the Geneva Conventions at will. These Conventions give warring parties the right to detain enemy soldiers without any other reason than merely preventing them from fighting, but on the basis of the prisoner of war status these enemy soldiers have the right to be treated fairly. Even those who do not qualify for the POW status have certain rights when apprehended: they too need to be treated fairly although they have far fewer privileges than those falling under the prisoners of war status.¹⁹ It is however an undisputed rule of international humanitarian law that under no circumstances people may be detained without any reason and kept indefinitely in prisons without any official charge or be held under inhuman circumstances and subjected to humiliation and abuse as many terrorist suspects have been. It is furthermore undisputed that detainees have to be treated humanely under all circumstances.

This begs the question why the U.S. has been able to implement policies which so clearly violated both national and international law. In relation to national law several issues are important: first of all the Bush administration had a massive

¹⁷ See the broad academic consensus as well as the decision by the by the ICTY 16 November 1998, Prosecutor v. Delacic and Others, nr. IT-96–21-T, par. 454.

¹⁸ See also the report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, United Nations, General Assembly A/59/324, par.13–24.

¹⁹ See Article 75 ff. of the Fourth Geneva Convention.

popular support in its fight against terrorism. Citizens were less concerned about protecting their constitutional rights than about the threat of new attacks. The popular television series *24* featuring Kiefer Sutherland as special agent Jack Bauer might have played a role in suggesting that torture is not just a legitimate but also the only truly effective means to fight terrorism and thus might have influenced public opinion. A few days after the first episode of *24* was broadcasted, Dershowitz a leading academic figure published an article in which he argued that torture should be sanctioned in certain limited circumstances (See also [3]). A survey among U.S. troops showed that less than half the troops in Iraq thought Iraqi civilians should be treated with dignity and respect and that more than a third believed that torture was acceptable if it helped save the life of a fellow soldier or if it helped get information about the insurgents.²⁰ Secondly rules and regulations of the administration may not as of themselves be judged in a court of law. Congress has to consent to laws but has less power to intervene when documents give interpretations of the law. This is especially true if the executive branch relies on war-time powers. Criminal courts can judge individuals who have violated national laws and the Supreme Court can judge whether the legal and/or constitutional rights of individuals have been violated. They can however only do so after a crime has been committed or when an individual has been the victim of a violation and has raised a complaint. As is the case for criminal courts, the Supreme Court like criminal courts cannot take any preventive action.

In relation to international law the reasons why no one intervened are threefold: first of all the international community at large lacks an effective law enforcer, secondly the U.S. itself was the sole and hegemonic superpower and thus no state had the power to put pressure on them and third the show of international support in the aftermath of the attacks was truly unprecedented. For the first time in its existence, NATO made use of article 5 of its treaty, only 24 hours after the attacks, stating that the attack on the United States had been an attack on them all.²¹ Many countries joined the U.S. in calling for not only the responsible persons to be brought to justice or to be eliminated, but to also confront the countries that were providing shelter or harbouring these terrorists. As president Bush stated, it was a matter of being “with or against us.” Faced with this decision few states were willing to be ‘against’. The U.S. government thus took advantage of the lack of an international law enforcer and the enormous support it had both within the U.S. as abroad.

Institutional and organization level: motives and opportunity

In March 2003 the United States invaded Iraq. The two main reasons for the invasion according to the Bush administration were Iraq’s chemical weapons

²⁰ The survey which was conducted by an army mental health advisory team sampled 1700 soldiers and marines between August and October 2006. See BBC News of May 4th 2007 available: http://news.bbc.co.uk/2/hi/middle_east/6627055.stm.

²¹ NATO statement (September 12, 2001). Full text available at NATO website: <http://www.nato.int/docu/pr/2001/p01-124e.htm>.

program and Iraq's alleged alliance with Al Qaeda.²² The soldiers sent to Iraq thus suddenly found themselves in the forefront of the War on Terror. Despite the arrest of Saddam Hussein in December 2003 the war wasn't going according to plan and resistance against American presence grew every day raising the levels of stress and strain within the ranks of the military. At Abu Ghraib as in many other detention centres the pressure to get actionable intelligence on the resistance but also on terrorist organizations was enormous. Next to the Military Police (MP), which was responsible for detention and Military Intelligence (MI), which was responsible for interrogations there were CIA interrogators present in Iraq and in Abu Ghraib as well as a large group of private contractors. These interrogators usually came in civilian clothes or covered their name tags and were commonly referred to as ghosts because of their sudden appearance and disappearance. They interrogated the so-called ghost prisoners, the high value prisoners of whom no records exist sometimes with dire consequences.²³ The presence of so many different units led to an unclear situation. This was even the case for General Janis Karpinski who was officially in charge of the prison but to whom it was unclear how many parties operated in her prisons and to whom they were accountable: "I thought most of the civilians there were interpreters, but there were some civilians that I didn't know ... I called them the disappearing ghosts. I'd seen them once in a while at Abu Ghraib and then I'd see them months later. ... They were ... always bringing in somebody for interrogation or waiting to collect somebody going out." ([7], 16).

The clear distinction and division between MP and MI units changed after a visit from Geoffrey Miller, camp commander at Guantanamo Bay, in August 2003. Miller came to Abu Ghraib in order to "Gitmoize" interrogation procedures and he recommended that 'detention operations must act as an enabler for interrogation...' just like they did in Guantanamo. He apparently said: "You have to treat the prisoners like dogs. If you treat them otherwise, or if they believe that they're any different than dogs, you have effectively lost control of your interrogation from the very start. So they have to earn everything they get. And it works."²⁴ As of August 2003 MP personnel guarding the detainees were regularly told by Military Intelligence to "loosen up" some of the prisoners and ensure they had a "bad night".

Because of this merging of roles the Military Police personnel found themselves in a situation in which it was unclear who was in command and which rules applied to them. There were for instance two different sets of rules and regulations: the Army Field Manual 34-52 ("Intelligence Interrogations") and the CIA manual ("Kubark Manual"). The two manuals lay out a completely different set of rules. The army Field Manual generally complies with the Geneva Conventions; the CIA manual goes beyond that. The most confusing aspect was that it was not clear which agencies were entitled to which procedures, therefore creating a situation where nobody took responsibility as it was not clear who was accountable to whom.

²² It soon turned out that there were no chemical weapons in Iraq and the Bush administration has been heavily criticised for this false pretext to invade Iraq. A Committee on Governmental reform of the United States House of Representatives concluded in a special investigation on March 16, 2004 that the five main officials made 237 misleading statements in 125 public appearances relating to the alleged threat Iraq posed.

²³ The so-called Ice man who featured in one of the pictures was allegedly tortured to death.

²⁴ Interview former Abu Ghraib commander Janice Karpinski. Documentary 'Ghosts of Abu Ghraib'.

Despite the fact that at the beginning of the war it had been made clear that the Geneva Conventions did apply in Iraq, Miller tried to Gitmoize Abu Ghraib thus convincing military personnel to use the same techniques as were used in Guantanamo. One may wonder however how many soldiers were really aware that the Geneva Conventions did not apply at Guantanamo but did apply in Iraq. From research on organizational criminology we know that ‘in an anomic environment, where there is a degree of uncertainty or confusion as to what is and what is not acceptable, comparatively high rates of deviance can be expected’ ([16], 157). We furthermore know that pressure from within the organizations compels individuals to be “creative” and “innovative” to get results and that this can easily lead them to commit the abuse ([16], 160). This was clearly the case at Abu Ghraib. The guards at Abu Ghraib did not know what rules applied or who was in charge. They were socialized into a culture in which illegal means seemed to be ordinary and legitimate means to fight the War on Terror. The continuous political rhetoric and the policy measures reinforced their belief that they were doing the right thing.

The pictures of Abu Ghraib show that the soldiers used the techniques authorized by Rumsfeld in the December 2002 memo but also other methods or a combination of techniques which amounted to a very refined and subtle way of humiliating and putting pressure on detainees. The techniques and methods used are furthermore so similar to techniques used in Guantanamo and Afghanistan that it seems likely that the MP’s were given further verbal directions on how to “soften up” the prisoners. The techniques were tailored to humiliate Muslims. Nudity for instance is already an extremely humiliating experience for Muslim detainees, but was made worse in the presence of females. Forced grooming too can be a deeply humiliating experience for devout Muslims as they often grow their beard as a sign of respect to the prophet Mohammed. The use of dogs also seemed to be tailored for use on Arabs, in whose culture a fear of dogs is commonly prevalent. These types of abuse were experienced as worse than physical torture by some of the victims thereof as the following quote illustrates: ‘They were trying to humiliate us, break our pride. We are men. It’s okay if they beat me. Beatings don’t hurt us, it’s just a blow. But no one would want their manhood to be shattered. They acted us to feel as though we were women, the way women feel, and this is the worst insult, to feel like a woman.’ ([15], 158). McCoy [14] furthermore concludes that the techniques were in line with the ‘revolutionary two-phase form of torture that fused sensory disorientation and self-inflicted pain’ as developed by the CIA. It is therefore likely that the abusive MPs were directed or at least received some form of guidance. It is known that they were complimented on several occasions because it worked. Charles Graner the alleged ringleader in the abuse was even awarded an Army recommendation early 2004 for his outstanding performance.

The abhorrent conditions at Abu Ghraib furthermore became conducive to the abuse. They in themselves can explain abuse as Zimbardo showed in the 1970s in his Stanford Prison Experiment. The similarities between what happened in Abu Ghraib and what happened in Zimbardo’s mock prison are striking [27]. If we take into account the fact that all soldiers had been socialized into military culture and are trained to never question an order and to accept the military hierarchy in combination with the neutralization techniques present in the overall policy in the War on Terror, it is easy to understand that the soldiers came to see the abuse as

nothing out of the ordinary, as legitimate and even necessary. We might conclude that both the techniques and the justification for their use were subtly permeated into daily activities (Cf. Sutherland's social learning theory). The urge and reflex to gain the necessary intelligence and the desire to do one's job in combination with the subtle direction and guidance the guards received can explain the abuse at Abu Ghraib. The lines between what was legitimate and what wasn't became blurred and it was unclear who was in control. This led to further abuse and torture. The very fact that so many pictures were taken indicates that the abuse was considered normal and legitimized: the guards did not feel a sense of having to conceal their actions. New guards who were initially shocked by this sight were socialized into prison life and began to accept the abuse as normal and legitimate. One recruit remembers: "My first reaction was, 'Wow, there [are] a lot of nude people here'... I, myself, have never been in a prison... So I had no experience at all as far as a warden or that type of thing."²⁵ But after a while soldiers became convinced that this was the way things ought to be done.

Institutional level: the lack of control

Precisely because there was an unclear command structure and it was not clear which rules applied it was equally unclear who would supervise the prison guards. Although the abuse was considered normal and justified by the abusive soldiers themselves, there were others who thought it was wrong. SPC Matthew Wisdom who worked at the day shift was one of those soldiers: "I saw two naked detainees, one masturbating to another kneeling with his mouth open. I thought I should just get out of there. I didn't think it was right ..." ([7], 24). He complained to his superior but to no avail as was admitted by his superior later: "Wisdom came to me. I told him to go back to work." His superior tried to explain to Wisdom that this was "justified use of force" and that Wisdom was too "young" to understand ([13], 129). SGT Ivan Frederick testified that he too complained about the nudity at first but that his superior told him that "That's the way MI (military intelligence) does it." ([13], 159) These examples show that several soldiers complained but to no avail. The military is known for its strict hierarchy and discipline as well as the strong requirement to respect authority and obey orders. The military is furthermore known for its *corps d'esprit* and closed ranks and soldiers will not easily tell on each other. The lack of clarity on rules, regulations and the chain of command in combination with these features of the military rendered the ordinary mechanisms of control inoperable.

Personal level: motives and opportunities

The perpetrators of the abuse at Abu Ghraib who featured in the pictures were low-ranking soldiers. They were not the ones deciding on specific policies or drafting the

²⁵ Sworn statement by Army Captain Donald. J. Reese. Available at: <http://www.publicintegrity.org/docs/AbuGhraib/Abu10.pdf>.

rules and regulations, they were the ones to execute these directives. They were generally inexperienced and untrained for the job but wanted to do their jobs well. The organization expected compliance from them. All the soldiers consistently testified that they received orders to “loosen the prisoners up”, to “give them a bad night” in order to make the work of MI easier. From their testimonies it becomes clear that they thought that what they did was legitimized and that it was their job to abuse the prisoners. The crimes they committed can in other words be considered crimes of obedience. Kelman and Hamilton ([11], 46) define crimes of obedience as acts ‘performed in response to orders from authority that is considered illegal or immoral by the international community’. For a crime to be qualified as a crime of obedience it is not necessary that the actual crime is committed after the issuance of a direct order. What is crucial is that the perpetrator believes that the crime is authorized or condoned by the authorities. In other words a crime is qualified as a crime of obedience when it is supported by the authority structure. It is a crime of obedience when ‘perpetrators believe and have reason to believe that the action is authorized, expected, at least tolerated, and probably approved by the authorities—that it conforms with official policy and reflects what their superiors would want them to do’ ([10], 126).

To obey orders might however have not been the only motive. Research on perpetrators of international crimes shows that there can be many different types of perpetrators who have many different motives for committing crimes [23]. In this case the pressures of the war in Iraq were enormous; the soldiers who had to guard the prisoners had not been prepared for the ensuing insurgency which killed more and more of their fellow soldiers each day. The Abu Ghraib prison itself was furthermore in the middle of a combat zone. Fear, anger and frustration are known to in some cases trigger aggression and in an atmosphere in which abuses seemed to be condoned coupled with an absolute power over the prisoners the chances that frustration indeed leads to aggression are significantly enhanced (cf. frustration-aggression theories).²⁶ Once the abuse became normalized it became seductive to commit further abuse. By transgressing certain lines the perpetrators probably felt a certain thrill and sensation (Cf. [8]) and continued their abuse. The soldiers were not allowed to use physical violence but that forced them to become creative in how to abuse and humiliate prisoners (Cf. [16]). Some of the perpetrators might have started to enjoy the feeling of superiority and the power to make other people do as they wish. Some probably just wanted to see how far they could go and were just having fun. Graner for instance already had a dubious track-record as a prison guard at State Correctional Institution-Greene in Greene County where multiple complaints were filed against him.²⁷

Internal group dynamics certainly played a role. Charles Graner for example was clearly the leader in the abuse despite the fact that Frederick outranked him. Frederick testified that he was afraid of Graner. Others however followed him, most notably

²⁶ See the testimony and the case of Javal Davis who snapped and as a consequences thereof jumped on the fingers and toes of a few prisoners.

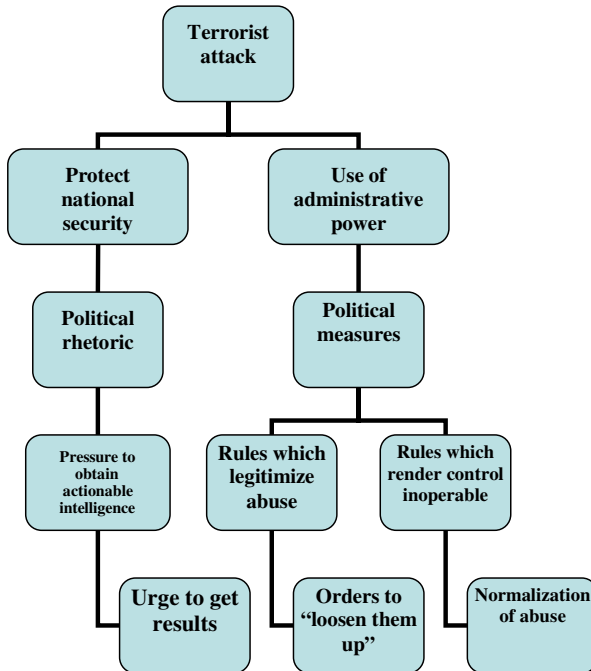
²⁷ From CNN transcripts, available at: <http://transcripts.cnn.com/TRANSCRIPTS/0405/16/sm.01.html>.

Lynddie England who was later judged to have an extremely compliant character. England was furthermore romantically involved with Graner at the time of the abuse and she would do whatever he asked of her. Graner probably enjoyed the power he had over England. In one picture he wrote: “look what I made Lynndie do”. Group dynamics is an important feature of ordinary crime. Warr [25] for example concluded that crime is a social event and so was the abuse at Abu Ghraib. Within a period of war groups tend to grow very close and the pressure to conform is even enhanced compared to an ordinary situation. At a certain point recruits were faced with a choice: to either take part in the abuse and be part of the group or choose otherwise. Some of those who would not take part went to their superiors but to no avail, others just said nothing: they didn’t want to jeopardize their friendships with their fellow soldiers, but still others took part in the abuse possibly out of fear to become an outcast. Ordinary mechanisms of social control were inoperative by this time. The perpetrators were under the impression that the abuse was a legitimate means to gain intelligence and the fact that those who complained were met by deaf ears strengthened this belief. As mentioned earlier, Graner even got complimented on his work several times before the publication of the pictures. Personal morality was rendered ineffective as well: the victims were dehumanized by their nudity and the continuous humiliation and abuse and neutralizations techniques were institutionalized: authorization and routinization neutralized personal moral opposition.

In conclusion we can say that due to extreme pressure resulting from the 9/11 terrorist attacks, the policy decisions taken by the Bush administration as well as the employed political rhetoric by leading government officials led to a political culture and organizational climate which apart from authorizing illegitimate interrogation techniques furthermore normalized and legitimized inhuman and degrading treatment of alleged terrorist suspects. Personal motives and group dynamics certainly played a role but should be seen and judged in the context of the War on Terror which seemed to justify torture and abuse. The political rhetoric and measures created an organizational culture of abuse which resulted in both motive and opportunity on the individual level within the organization to resort to illegitimate means. In other words there is a direct link between the governmental policy to launch the War on Terror and the actual abuse at Abu Ghraib. (See Tables 1 and 3).

The aftermath

The publication of the pictures of Abu Ghraib made it impossible for anyone to deny that horrible things had happened and that both national law—U.S. War Crimes Act and the U.S. Torture Act- and international law—Geneva Conventions and the Convention against Torture- had been violated. The moral outrage was loud and clear. The immediate reflex of the Bush Administration to the pictures of Abu Ghraib was to conduct a policy of damage control and to consequently blame the hands-on perpetrators who featured in the pictures. They were the ones caught in the act due to their own stupidity to take pictures and thus they were to take the full blame. The political message was clear: this is an isolated case for which some rotten apples are responsible which should not reflect badly upon the rest of the armed forces. Several military investigations such as those headed by respectively Taguba,

Table 3 Chain of events: interrelation of various levels

Schlesinger, Church and Fay-Jones were initiated²⁸ and the members of the 372nd MP Company who featured in the pictures such as Charles Graner, Ivan Fredericks, Javal Davies, Sabrina Harman and Lynndie England were court-martialled and tried by a military court.

At the trial the prosecutors insisted that the abuse was caused by a few bad apples who discredited the United States. The accused recruits tried to prove that the abuse was systematic and widespread and that they acted on instructions but they were continuously prevented from raising these points by the military judge who kept saying that not the U.S. government but the individual soldiers were to stand trial. The fact that the pictures might merely reveal the tip of the iceberg was completely ignored. MI, OAG (Other (undefined) governmental organizations), the CIA and private contractors gave the MP's instructions to soften up the prisoners but little has been revealed as to what these organizations did themselves. It is for example telling that Sabrina Harman was prosecuted and found guilty for taking pictures of a dead prisoner, the so-called Ice Man who was tortured to death while no one was prosecuted for torturing him to death. Although the CIA program of enhanced interrogation techniques is still not fully revealed it is known that this program goes quite some steps further than what the pictures revealed. This however did not

²⁸ All of these investigations took place in 2004. See for the full reports: Greenberg and Dratel [4].

prevent the military judge from sentencing the soldiers who featured in the pictures. Graner the alleged ringleader was sentenced to 10 years imprisonment, Frederick to 8 years, Lynddie England to 3 years, Javal Davis to 6 months and Sabrina Harman to 3 months to give just a few examples. Janis Karpinski and Jerry Phillabaum, their immediate superiors were both demoted and reprimanded but those higher up in the chain of command and those at the Department of Defense who designed the policies which created a culture of abuse were not held accountable—quite the contrary, many were promoted to prestigious jobs. The low-ranking soldiers were to take the full blame. This is not surprising either: in cases of organizational crime it is very common that low-ranking employees get caught whereas those higher up in the chain of command who have ordered the crimes or created the circumstances get off the hook.

While a Senate Judiciary Committee conducted hearings in July 2006 and condemned what had happened at Abu Ghraib, the Supreme Court in the *Hamdan versus Rumsfeld* (2006) case declared that the Geneva Conventions were applicable to the detainees at Guantanamo Bay. The administration was thus forced to change its policies on certain points but as of today no one within the administration was held accountable for the consequences of the war it launched. Law suits against Rumsfeld for instance were dismissed.²⁹ In the following paragraph we will therefore discuss whether Donald Rumsfeld, Secretary of Defense at the time of the abuse and head of the Department of Defense and as such responsible for the department which issued many of the memo's which created the permissive atmosphere towards abuse of detainees in the War on Terror, could be held responsible for the International Criminal Court.

A case against Donald Rumsfeld?

The International Criminal Court (ICC) which is situated at The Hague (The Netherlands) was established by the Rome Statute in 1998 and has jurisdiction for war crimes, crimes against humanity and genocide. Unlike the International criminal tribunals for former Yugoslavia and Rwanda which were established by the UN Security Council the ICC was established by a treaty to which states can decide to become a party. In the treaty it has been clearly established that the ICC may only exercise jurisdiction over crimes committed on the territory of a state (art. 12 par. 2 sub a ICC) or by nationals of a state (art. 12 par. 2 sub b) which has recognized the jurisdiction of the Court by ratifying the Rome Statute (1998). As neither Iraq nor the United States has become party to the ICC Statute the preconditions for the exercise of jurisdiction have not been fulfilled. There are two exceptions to this rule. The first exception occurs when either one of the named states lodges a declaration with the registrar that it accepts the jurisdiction of the court in relation to one particular case. So if either Iraq or the U.S. lodges such a declaration the ICC may exercise jurisdiction. Iraq might consider this at some point but the U.S. will definitely not, taking into account that it heavily opposes the idea that American

²⁹ See for example the dismissal of a Torture case on March 27th 2006 by Judge Thomas Hogan.

soldiers—let alone former Secretaries of Defense—have to stand trial before the ICC (See [21]). The second exception is when a case is referred to the ICC by the Security Council on the basis of Chapter VII of the UN Charter. When the Security Council would then qualify the abuse at Abu Ghraib and other places all over the world as a threat to international peace and security then it may request the ICC to look into the case and start proceedings. This however is unlikely to happen. We thus have to conclude that the ICC will not be able to exercise its jurisdiction to try a case against Donald Rumsfeld or others within his department or the U.S. administration in relation to the torture memo's and the abuse and torture at Abu Ghraib due to the mere fact that the U.S. has not ratified the ICC Statute and has not recognized the jurisdiction of this court as 107 other states have done. Despite the fact that the ICC is consequently not entitled to exercise its jurisdiction for this reason it would be interesting to see whether the ICC could effectively start a proceeding if the U.S. would have ratified the Rome Statute.

An important question would be whether the ICC would have jurisdiction to look into the matter taking the type of crimes into account. The abuse and torture committed at Abu Ghraib clearly violates international law and can be qualified as a war crime. The pictures of the abuse clearly show that the detainees were not treated humanely as is required by international humanitarian law and thus a war crime has been committed. On the basis of art. 8, par. 2 sub a ICC Statute the ICC has jurisdiction over war crimes. The crimes committed can furthermore be considered crimes against humanity and more particularly torture and other inhumane acts which have been criminalized in art. 7 par. 1 sub f and sub k of the ICC Statute. Torture is defined as 'the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused'. Other inhumane acts are described as 'of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.' For a crime to be qualified as a crime against humanity it needs to be either widespread or systematic. From the extensive information on the abuse, humiliation and torture at Abu Ghraib as well as in many other facilities in Iraq and elsewhere, more particularly Afghanistan and Guantanamo Bay and when taking into account the so-called torture memos and guidelines legalizing illegitimate techniques it has become clear that the torture and inhuman treatment was both widespread and systematic.

In the preamble of the ICC Statute it is stated that grave crimes such as war crimes, crimes against humanity and genocide 'threaten the peace, security and well-being of the world' and that 'the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international co-operation.' The message is clear: international crimes need to be prosecuted. The jurisdiction of the ICC is however complementary as becomes apparent from art. 1 jo. 17 ICC Statute. This means that the prime responsibility to prosecute lies with the state which has committed the crimes. The ICC may only prosecute if the national state responsible for the crimes is unwilling or unable to prosecute the crimes. The ICC may intervene if a state is not prosecuting at all, not conducting the prosecutions fairly and independently or in case the prosecutions are conducted in such a manner as to shield the perpetrators. The U.S. has conducted a limited number of trials and the MP personnel who featured in the pictures of Abu Ghraib were sentenced but as stated

earlier one might wonder whether these soldiers had a fair trial as they were not allowed to bring forward the systematic nature of the abuse. They might thus not have had a fair chance to show that the abuse they committed was the result of policy rules and regulations rather than their individual wickedness. The military trials as described by Mestrovic [13] in his book *The Trials of Abu Ghraib* give the impression that those higher up in the chain of command were shielded in order to prevent their clear involvement to be exposed. In other words there seem to be enough reasons to present the argument that the ICC could claim jurisdiction arguing that the U.S. did not adequately prosecute those responsible for implementing the abusive policies and shielded those higher up in the chain of command.

The abuse at Abu Ghraib and other U.S. detention facilities within Iraq and Afghanistan thus seems to fulfil all jurisdiction criteria set by the ICC. The next important question is whether Rumsfeld as former Secretary of Defense and others in his department could be held criminally responsible for the crimes committed at Abu Ghraib. Individual criminal responsibility is described in art. 25 ICC statute. It is important to note that not just the physical perpetrators can be held responsible but all those who commit, order, solicit, induce, facilitate, aid, abet or otherwise contribute to the commission of the crime. Such a wide application of individual criminal responsibility is justified if we take into account that many people—and usually many state agencies are involved in committing international crimes such as war crimes, crimes against humanity and genocide.

From a legal point of view one has to distinguish the extent to which a policy maker such as Rumsfeld could be held responsible for crimes committed as a direct consequence of his leadership and crimes committed as a result of a more indirect consequence. By declaring certain illegitimate measures as legitimate (such as stress positions, isolation, sensory deprivation, sleep deprivation, forced nudity, forced grooming, induction of stress and exploitation of phobias)³⁰ Rumsfeld could probably be held responsible for ordering, soliciting or inducing war crimes on the basis of the ICC Statute (art. 25 jo. 8 ICC Statute). Next to this direct responsibility it might also be possible to hold Rumsfeld and his team responsible for creating a culture of abuse on the basis of either individual criminal responsibility or on the basis of his command responsibility. Command responsibility is enshrined in art. 28 ICC Statute. This provision acknowledges that both military and civilian commanders can be held criminally responsible for the conduct of people under their control or authority. A commander can be held responsible as a result of his or her failure to exercise proper control over their forces especially when the commander either knew or, owing to the circumstances at the time, should have known that these forces were committing or about to commit crimes. The commander can also be held criminally responsible if he failed to take all necessary and reasonable measures within his or her power to prevent or repress the commission of these crimes or his failure to submit the matter to the competent authorities for investigation and prosecution. If these criteria are used in a court of law such as the ICC it is not unlikely that Secretary of Defense Rumsfeld can also be held responsible for the conduct of the troops in Iraq which went

³⁰ See Memo # 19 in Greenberg and Dratel [4], 227.

beyond the conduct he authorized. It is not known to us at what point Rumsfeld became fully aware of the ongoing abuse but as soon as he did he should have immediately reacted. But even if he did not have direct knowledge of the abuse and torture he should have known that within a stressful war situation soldiers who do not have crystal clear instructions might go further than authorized. He should have known that the prison in Abu Ghraib was a so-called atrocity producing situation and crimes were bound to happen. Zimbardo's prison experiment has shown that prisons in general are atrocity producing situations and the ongoing stressful war and the enormous pressure to gain actionable intelligence in the War on Terror multiplied the chances that the situation would get out of hand. Knowing all this Rumsfeld and others along the line should at least have taken preventive measures. Not doing so can make him—as the person in charge—criminally liable.

Conclusion

In our article we have taken a criminological approach to the crimes committed and have attempted to demonstrate that the terrorist threat exerted enormous pressure on the Bush administration leading to a widespread determination at all governmental levels to use all methods and means deemed necessary to effectively deal with this threat. The government used its administrative power to implement policies which legitimized the abuse and which at all levels reduced control and effectively rendered constraint mechanisms inoperable. This policy coupled with the specific characteristics inherent to military organizations, the unclear regulations, the lack of a clear command structure and an overall atmosphere of permissibility—even necessity—to use all possible means led to a situation in which abuse became inevitable. Although the characteristics of the individual perpetrators and group dynamics indefinitely played a role, they as of themselves were not sufficient. In ordinary circumstances individuals who abuse prisoners would most likely have been disciplined. This did not happen at Abu Ghraib. On the contrary, before the abuses became public and caused moral outrage, the perpetrators were complemented for doing a good job. It is thus far more likely that the abuse was not only a consequence of a state of anomie but was the logic outcome of a culture of abuse. In the trials the blame was shifted to the low-ranking perpetrators. However, with the help of criminological theorizing we can look beyond the outcome of the trials of low ranking soldiers and see how political rhetoric and political measures came to shape an environment in which the abuse was inevitable. The abuse at Abu Ghraib can consequently be considered more than mere collateral damage: it is a clear example of a state induced crime. The ICC is a criminal court which was created to deal with international crimes such as the crimes committed at Abu Ghraib. It is par excellence a court which can deal with state crimes as it is known that states themselves are rarely able or willing to adequately deal with such crimes. We are not claiming that Rumsfeld should be convicted of war crimes and crimes against humanity. We do however think that it would be appropriate to have the ICC look into the case as the paper trail left behind by the Department of Defense and other U.S. governmental institutions seems to suggest that there is enough evidence to at least start a prosecution.

References

1. Coleman, J. W. (1985). *The criminal elite: the sociology of white collar crime* (4th ed.). New York: St Martin's Press.
2. Danner, M. (2004). *Torture and truth—America, Abu Ghraib and the war on terror*. New York: Review Books.
3. Dershowitz, A. M. (2002). *Why terrorism works*. Yale: University Press.
4. Greenberg, J. L., & Dratel, K. J. (Eds.) (2005). *The torture papers: the road to Abu Ghraib*. Cambridge: University Press.
5. Goldsmith, J. (2007). *The terror presidency—law and judgement inside the Bush administration*. New York: W.W. Norton & Company.
6. Gourevitch, Ph., & Morris, E. (2008). *Standard operating procedure*. New York: Penguin.
7. Hersh, S. (2004). *Chain of command—the road from 9/11 to Abu Ghraib*. London: Penguin Books.
8. Katz, J. (1988). *Seduction of crime*. New York: Basic Books.
9. Kauzlarich, D., & Kramer, R. C. (1998). *Crimes of the nuclear state—at home and abroad*. Boston: Northeastern University Press.
10. Kelman, H. C. (2005). The policy context of torture: a social-psychological analysis. *International Review of the Red Cross*, 87, 123–134.
11. Kelman, H. C., & Hamilton, V. L. (1989). *Crimes of obedience*. New Haven: Yale University Press.
12. Kramer, R. C. & Michalowski, R. J. (1990). *Toward an integrated theory of state-corporate Crime*, Paper presented at a meeting of the American Society of Criminology, Baltimore, MD, November.
13. Mestrovic, S. G. (2007). *The trials of Abu Ghraib—an expert witness account of shame and honor*. Boulder: Paradigm.
14. McCoy, A. (2006). *A question of torture: CIA interrogation, from the cold war to the war on terror*. New York: Metropolitan Books.
15. McKelvey, T. (Ed.) (2007). *One of the guys—women as aggressors and torturers*. Emeryville: Seal.
16. Passas, N. (1990). Anomie and corporate deviance, *Contemporary Crisis*, 157–178.
17. Physicians of Human Rights (2008). *Broken laws, broken lives—medical evidence of torture by US personnel and its impact*. Available on http://brokenlives.info/?page_id=69.
18. Roth, K. (2004). The law of war in the war on terror—Washington's abuse of "enemy combatants" in: *Foreign Affairs*, 2.
19. Saar, E., & Novak, V. (2005). *Inside the wire: a military intelligence soldier's eyewitness account of life at Guantanamo*. New York: The Penguin.
20. Sands, P. (2008). *Torture team—Rumsfeld's memo and the betrayal of American values*. New York: Palgrave Macmillan.
21. Sewall, S. B. & Kaysen, C. (Eds.). (2000). *The United States and the international criminal court—national security and international law*, Lanham: Rowman & Littlefield Publishers, inc.
22. Skyes, G. M., & Matza, D. (1957). Techniques of neutralization: a theory of delinquency. *American Sociological Review*, 22, 664–670.
23. Smeulers, A. (2008). Perpetrators of international crimes: towards a typology. In A. Smeulers, & R. Haveman (Eds.), *Supranational criminology: towards a criminology of international crimes* (pp. 233–266). Antwerp: Intersentia.
24. Suskind, R. (2006). *The one percent doctrine—deep inside America's pursuit of its enemies since 9/11*. New York: Simon & Schuster Paperbacks.
25. Warr, M. (2002). *Companions in crime—the social aspect of criminal conduct*. Cambridge: University Press.
26. Welch, M. (2007). Sovereign impunity in America's war on terror: examining reconfigured power and the absence of accountability. *Crime Law Social Change*, 47, 135–150.
27. Zimbardo, Ph. (2007). *The Lucifer effect—understanding how good people turn evil*. New York: Random House Trade paperbacks.